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Judicial Discretion and Doing between the Banks and their Customers: A Critical Analysis of the Supreme Court Decision in *Office of Fair Trading v Abbey National Plc and Others*

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If it is possible [for financial services firms] to make money out of gullible unsuspecting customers... [they think] that is perfectly acceptable."

Mervyn King, Governor of the Bank of England, Telegraph 5th March 2011

"Judges are not simply umpires, impartially enforcing the fair rules of a voluntary and morally benign sporting event. Judges have political power in a legal system that may only be partially just or legitimate, or that may occasionally demand what it ought not demand. This significantly complicates the moral position of the judge, and we need an approach to adjudication that is cognizant of this complexity" (Reeves 2010, p. 186)

Summary

Judges have more discretion in cases than they themselves, legal scholars and practitioners acknowledge. The shape and outcome of the law ultimately depends on the judicial interpretation of its extent, scope and application. Judicial interpretation, it is argued, is influenced by judicial discretion. The core argument of this article is that judicial discretion outweighs other considerations in the Supreme Court's decision in *Office of Fair Trading v*

¹ A version of this paper was delivered at the Society of Legal Scholars' Conference in 2010.

Abbey National Plc and Others [2009] UKSC 6, [2010] 1 A.C. 696 (hereafter “the judgment”). The chief purpose of this paper is to identify the pivotal role of judicial discretion in the above case with a view to determining the parameters that informed the Supreme Court’s decision. This article attempts to illustrate that the decision in the judgment rests mainly on the exercise of discretion on certain key issues.

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Introduction

This article argues that the challenge before the Supreme Court and the lower courts in the case under study was a conflict between doing substantial justice as opposed to doing technical justice. The case is, in this sense, dependent on the exercise of judicial discretion as to the interpretation of the law, a duty which is assigned to the courts, not the legislature. As the paper will elaborate, the judgment was largely a triumph of technicality over substantial justice. The practical consequence of which was to endorse the banks right to “impose hefty charges on their customers” (Barrow, 2010). Leveraging on jurisprudential discourse and procedural analysis of judicial discretion, this paper critically assesses the challenges faced by the Supreme Court within the particular context of this case, as well as the alternative routes that were available to the Court.

Theoretical explanation of Judicial Discretion

Judicial discretion is an elusive concept. Its existence is generally acknowledged but its ambit is not agreed upon by scholars and practitioners alike (Barak, 1989, p 3, Robertson, 1998, p. 6). Because the existing legal system is not perfect, it is inevitable that judicial discretion remains part of the system (Klatt, 2007, p. 506). As Waddams notes:

”All legal rules, as has always been recognised, contain elements of uncertainty, because the circumstances in which the rules come to be applied cannot be precisely foreseen, nor can any rule, however detailed, describe in advance every possible future case.” (Wadams, 2001, p. 59)

On the one side of the debate is the American realist who argues that in almost all cases a judicial officer is capable of deciding a case before it in “directly contradictory way” in favour of either a claimant or a defendant and thereafter find adequate grounds for justifying either outcome (Yablon, 1989, p. 236). This approach thus rejects authoritative legal rules as sufficient basis for judicial decisions. This poses the question of whether judicial decisions are random or arbitrary. Any suggestion that judicial decisions are arbitrary or random, Klatt observed, is implausible (Klatt, 2007, p. 507). The Critical Legal Studies (CLS) are on this side of the debate. They argue that law is politics and judicial decisions are not neutral or value free. Law, according to them, is indeterminate. The scholars went further by suggesting that the law usually serves the interest of the powerful and the rich and less in favour of others outside those classes. (Hutchinson, 1989 p. 4, Tushnet, 2005). The CLS scholars contend that “judges decide cases without being bound by precedents, or any other pre-existing legal rule”(Segall, 1994, p. 992).

On the other side of the argument is the approach promoted and led by H.L.A. Hart (Hart, 2007). Hart acknowledges the existence of certain amounts of discretion in the judicial decision making process but argues that they apply in very limited circumstances. To Harts and theorists that ascribe to this view, judges are constrained in significant ways by legal rules (Yablon, 1989, p. 238). The judges’ decisions are thus largely determined by the legal rules even if on occasion they are loosely applied. To Hart, discretion is what occurs when the guidance of authoritative legal rules run out and then the judge had to assume the role of a law maker (Yablon, 1989, p. 239). Even though Dworkin, (a student of Hart’s) accepted the core argument of Hart, he contended that the judge is never without an authoritative legal rule to decide a case. According to him, where the judge needs to employ his discretion, he is following a rule even though it may be vague and open textured (Yablon, 1989, p. 241). The judge may justify his or her choice by nebulous concepts as fairness, the interest of justice, expediency etc. The role of the judge therefore is to “consider various potentially applicable norms in reaching her decision” (Yablon, 1989, p. 242). Klatt will seem to be of the same opinion when he says that

“[d]iscretion ...is a relative concept. It refers to a given standard of authority against which the area of freedom can be measured. Interpreting discretion as a relative concept is equivalent to accepting that discretion is limited, whatever those limits may be”. (Klatt, 2007, p. 507)

Apart from the jurisprudential or theoretical discourse on judicial discretion, scholars taking a procedural angle have also contributed to the discourse. Davis defines judicial discretion in the following way: “A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction” (Davis, 1969, p. 4).

Judicial discretion allows flexibility in the application of law (Klatt, 2007, p. 508) and ensures that judges can potentially fill in the gap where there is a gap in the law. The problem however is that the concept also creates uncertainty in the outcome of judicial process and

make the process vulnerable to the individual (moral) conviction of the judges (Klatt, 2007, p. 507).

Background to OFT v Abbey National Plc

The Office of Fair Trading (OFT) had jurisdiction, under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), to consider the fairness of “a contractual term which has not been individually negotiated”. Regulation 5 provides as follows:

“Unfair Terms

5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.”

The consequence of the provision according to Reg 8(1) is that such a term is “not binding on the consumer” (under Reg 8(2)). However this may not affect the validity of the contract if severance is possible. According to Reg 10 of the 1999 Regulations, the OFT is obligated to investigate a complaint that a contractual provision is unfair under regulation 5 where that provision is in “general use”. However, a limitation is placed on this power under regulation 6. Reg 6(2) of the 1999 Regulations provides that:

“In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-

- (a) to the definition of the main subject matter of the contract, or
- (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.”

Reg. 6(2) is generally perceived as a compromise to satisfy freedom of contract proponents (Morgan, 2010, p 209, Collins, 1994, p. 238). Nevertheless, the Regulation as a whole had led to the hitherto widely held assumption that that its provisions introduced significant protection for consumers (McDonald, 2002, p 763), Bright, 2000, p. 331).

Factual Background to OFT v Abbey National Plc

The OFT in the past few years have been actively engaged in the protection of consumers who have been at the wrong end of the aggressive target driven corporate drive for profit. It has succeeded in a number of cases to get companies to change their practices. It has also taken the judicial route to facilitate the achievement of its objectives. It was with the aim of achieving its objectives that it found it expedient to intervene in the case under study.

Bank customers were routinely subjected to high charges for unauthorised or authorised overdrafts (including charges made for bounced cheques or other payments made in the absence of fund). This has not always been the norm in banking practice in the past. Previously, a customer was not allowed to overdraw his or her account without authority or consent of the bank. Furthermore, the Courts have held that if a customer overdraws his or her account without authority and the bank honours it, he is taken to have requested an overdraft and the bank by granting the request accepted the request (*Foley v Hill* (1848) 2 HCL 28). In accepting the overdraft the bank applied its standard terms to the transaction. The banks could have maintained this practice but they did not do so. In 2005, bank customers started bringing claims against their banks. The claims were hinged upon two main arguments either that the charges were illegal penalties or that the terms giving rise to them were unfair under the Unfair Terms in Consumer Contract Regulations 1999. Some of these cases were settled out of Court but with an increasing number of cases being filed it became apparent to the banks that they might have to risk a judicial pronouncement. An agreement was reached between the OFT and the banks to the effect that the OFT could make an application to the Commercial Court to seek a declaration whether the charges could be challenged as illegal penalties and whether the OFT could investigate the fairness of the charges under the regulation. The High Court, the Court of Appeal and the Supreme Court all agreed, and rightly so, that the charges do not amount to illegal penalties. The High Court and the Court of Appeal however held that the OFT could investigate the fairness of the charges under the Regulations. However, the Supreme Court disagreed declaring:

(3) “that, the bank charges levied on personal current account customers in respect of unauthorised overdrafts (including unpaid item charges and other related charges) constitutes part of the price or remuneration for the banking services provided and, in so far as the terms giving rise to the charges are in plain intelligible language, no assessment under the Unfair Terms in Consumer Contracts Regulations 1999 of the fairness of those terms may relate to their adequacy as against the services supplied

(4) The bank charges referred to in the declaration at paragraph (3) above and the terms giving rise to them are the bank charges...”

This judgment dealt a blow to the attempt by the OFT to investigate the fairness of unarranged overdraft charges and compelled the OFT to abandon the investigation.

Clarifying the Case That Was Presented: The Interpretation of “Term and Charges”

It is common ground that the bank terms were not individually negotiated therefore falling under Reg. 5 and provisions of the Schedule to the Regulation. It is also apparent that the OFT has the statutory power to consider or assess the unfairness of “any contract term drawn

up for general use” (Reg 10). The three courts also agreed that the terms are substantially plain and intelligible and as such does not contravene Reg 6(2).

The crucial issue for the court to decide was whether the terms upon which the charges are based are barred from being assessed by Reg 6(2) (a) and (b). For Reg 6(2) to apply the term the OFT sought to assess must either

- i. Relate to “the definition of the main subject matter of the contract” or
- ii. Relate “to the adequacy of the price or remuneration, as against the goods or services supplied in exchange”.

The Supreme Court was correctly of the opinion that Reg 6(2)(a) is not relevant to the determination of this case. The case was decided based on the application of Reg 6(2)(b).

Before going further, it will be pertinent to examine the nuances of the case presented by the OFT. In doing this, it is important to draw a distinction between price terms and other terms of a contract.

In contract law, the terms of a contract and the price/remuneration payable under the contract are not necessarily the same thing. Generally, the terms are parties’ conditions for entering into a contract i.e. the obligations and duty assumed by each party. The terms cover several issues and may generally include the description of the good or services supplied, manner of delivery, price and payment structure, termination and limitation of liability etc.

A careful reading of Reg 6(2)(b) shows that the provision does not exclude all the terms of contract but terms that are related to the adequacy of the price or remuneration. Lord Walker acknowledged this view when he noted that the House of Lord’s decision

“in First National Bank shows that not every term that is in some way linked to monetary consideration falls within Regulation 6(2)(b). Paras (d), (e), (f) and (l) of the “greylist” in Schedule 2 to the 1999 Regulations are illustration of that”.

However, he summarily concluded that in this case “the Relevant Terms and Relevant Charges do fall squarely within Regulation 6 (2)(b)” (para 42).

What the Supreme Court did as shown in its judgment was to equate all the terms in dispute with the charges and concluded that they were excluded from assessment by 6(2)(b). The Supreme Court’s approach is best shown by Lord Phillip’s recast of the issue raised by the appeal (para 57):

“The agreed Statement of Facts and Issue describes the issue raised by this appeal as follows:

“Whether an assessment of the fairness of the Relevant Terms (pursuant to which the Relevant Charges are levied) would relate to the adequacy of the price and remuneration, as against the services supplied in exchange, within the meaning of regulation 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999.”

This does not accurately describe the issue raised by this appeal, which is very much more narrow. That issue is whether the Relevant Charges constitute “the price or

remuneration, as against the services supplied in exchange” within the meaning of the Regulation.”

By strictly narrowing the dispute to this “small point of construction” (Morgan, 2010, p. 208) the Supreme Court was able to proceed on the assumption that all the “Relevant Terms” in dispute are also the “Relevant Charges”. Whittaker recently suggested that the Supreme Court was constrained by the agreement of the parties. However, the question posed by the Supreme Court was very different from the one put forward by the parties. The decision of the Supreme Court to recast the question affected the scope of the answer that was required (Whittaker, 2011, p. 106). Chen-Wishart correctly noted the consequence of the court recast of the question which was that “the Supreme Court held that regulation 6(2)(b) covers any price or remuneration terms and that unarranged overdraft bank charges, being price terms are so exempt from the unfairness assessment” (Chen-Wishart, 2010, p. 157).

However, it is argued that the issues may be broader than that. There are two principal issues. One relates to the interpretation of the terms of the contract. The second is the applicability or otherwise of the Regulation to the relevant term.

The law relating to interpretation of contract has been summarised in five principles by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 W.L.R 896 and further summarised by Lord Bingham in *BCCI v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 as follows:

“To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties’ relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties’ intentions the court does not of course inquire into the parties’ subjective states of mind but makes an objective judgment based on the materials already identified.”

This approach is largely accepted as the position of the law in England (Lewison, 2007, p. 3). This approach favours the interpretation that would be given to the terms by reasonable person (natural and ordinary meaning) and importantly exclude their subjective intent. This is an objective exercise (Lewison, 2007, p. 24). Crucially, where a contract can have more than one meaning, the court has the discretion to select one meaning (Lewison, 2007, p29). It has been suggested persuasively that Courts sometimes manipulate the interpretation of contract in order to achieve a fair result based on the facts of a particular case (Lewison, 2007, p. 48) which raises the question whether what is considered fair by the judge at a particular point in time aligns with what the average person in the society considers to be fair.

The main challenge before the Court is the interpretation of the terms of the contract and the determination of what categories of terms they belong to in order to determine the applicability of Reg 6 (2)(b) or otherwise. Lord Mance correctly identified this task when he opined that

“the identification of the price or remuneration for the purposes of Article 4(2) and regulation 6 (2) is a matter of objective interpretation for the court. The court should no doubt read and interpret the contract in the usual manner, that is having regard to the view which the hypothetical reasonable person would take of its nature and terms”. (Para 113)

As Posner correctly noted “contract interpretation is the undertaking by a judge or jury... to figure out what the terms of a contract are, or should be understood to be”(Posner, 2004, p. 1582). This is what the parties would have understood the terms to mean. Where the parties’ intention is not explicit or contradictory then the court steps in to fill in the gap. According to Posner, there are several alternatives open to the Court. The Court may

- “1. Try to determine what the parties really meant...
2. Try to determine what resolution the parties would have agreed to had the issue occurred to them when they were negotiating the contract.
3. Pick the economically efficient solution...
4. Treat the case as a toss-up, and apply some rule for breaking ties...
5. Combine 1 and 4 by pretending that a written contract always embodies the complete agreement of the parties and that no other evidence of the contract’s meaning, besides the text itself, is to be considered..”. (Posner, 2004, p. 1582)

To understand how the Supreme Court proceeds, it is pertinent to examine as an example one of the clauses considered by the Courts. In this connection we shall examine Clause 3 of the Abbey National’s term considered by the lower court on instant over draft which provides as follows:

“3.3 Instant Overdrafts

3.3.1 Without contracting us at all, you may also request an overdraft by trying to make a payment from your current account, where that payment would:

- (i) cause your current account to go overdrawn without an Advance Overdraft in place; or
- (ii) cause your current account to go over any Advance Overdraft limit we have previously agreed with you.

In either case this is referred to as an Instant Overdraft request.

3.3.2 You will be treated as making an Instant Overdraft request to us automatically if you do not have enough money in your current account, or enough unused Advance Overdraft with us and you do any of the following:

- (i) you try to purchase goods or services using your debit card or by cheque;
- (ii) you try to withdraw money from your current account;
- (iii) you try to make a payment from your current account against a cheque which is later returned unpaid or against any other deposit in your current account which has not been processed; or
- (iv) an automated payment you have set up, such as a Direct Debit or a standing order, is requested to be paid.

3.3.3 An Instant Overdraft Request Fee will be payable by you each time that you use the Instant Overdraft service. The Instant Overdraft Request Fee is payable regardless of whether we agree to give you the Instant Overdraft requested.

Important: Payment of the Instant Overdraft Request Fee may result in you becoming overdrawn (or, if you already have an overdraft, further overdrawn) even if we do not agree to give you the Instant Overdraft.

3.3.4 We may give you an Instant Overdraft or we may refuse to do so. If we agree, we will give you an Instant Overdraft to cover the amount of the withdrawal or the payment involved. An Instant Overdraft Monthly Fee will by (sic) payable by you monthly for every calendar month in which you have used our Instant Overdraft

service (including where you continue to use an existing Instant Overdraft facility). Interest will also be payable by you at the Instant Overdraft Interest Rate on any money you borrow by way of an Instant Overdraft. If we refuse your Instant Overdraft request but your account is in credit or, if you have an Advance Overdraft and your account still has some unused Advance Overdraft on it, then you will not have to pay the Instant Overdraft Monthly Fee.”

The clause throws up the following possibilities: The overdraft facility may be treated as a secondary contract and therefore independent of the main contract or treated as part of the main contract. It is thus possible for the court to treat the instant overdraft as a different product founded on separate contractual terms or as the court did as part of the original contractual arrangement. It is important to note that an overdraft is usually treated as a loan facility. Bank loan facilities are based on separate terms different from the terms for a current account (Cranston, 2002, p. 299, Morris, 1967, p. 574). If this is accepted, then a treatment as a separate contract will be more compelling (more on this later). A further inquiry is whether or not all these terms related to ‘charges’.

A plain reading of these clauses should lead to the following conclusions:

1. Clause 3.3.1 is an invitation to treat in relation to a product-Instant Overdraft Request. Arguably, this product is not part of the original contract for a current account.
2. Clause 3.3.2 states when the action of the customer will be taken as an automatic application for the product. (This can be regarded as an offer coming from the customer.)
3. Clause 3.3.3 states that a fee will be payable. This is a term of the contract that may arguably be linked with price and remuneration. However the clause itself does not specify the fees payable.
4. Clause 3.3.4 specifies the Bank’s possible response to an instant overdraft application. This may be regarded as the acceptance of an offer leading to liability to pay further fees.

The fees referred to in clauses 3.3.3 and 3.3.4 is set out in another document with the title “key features and price list”.

From the plain interpretation of the clause 3, it is suggested that not all the terms in the clause are related to price and charges. This is particularly true of Clauses 3.3.1 and 3.3.2. It is submitted that clause 3 should not in its entirety be caught by Reg 6 (b) in so far as it relates to an unsolicited and a unilateral invitation to treat of an additional product. They are the terms of a contract whose consequence like any other contract is a charge if the contract is duly executed by the parties. While the charge itself may be caught by 6(2)(b), the terms of the contract leading up to the charge should be opened to scrutiny by the OFT. It is thus opined that the position of the OFT that it could assess the fairness of the terms applicable to unarranged overdrafts etc under the test set out in regulation appears to be well founded. It thus appears that the court simply imposes what it thinks the term meant without having much regard for the contract itself (Calnan, 2007, p. 18).

Consumer Protection v Consumer Choice

This case takes the debate between the proponents of consumer choice and those for consumer protection which dominated discussion before the making of the EC Directive and

after it to the Supreme Court but not for the first time. In *Director-General of Fair Trading v. First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481 the House of Lords considered the version of the exemption in 3(2) UTCCR 1994 which is similar to 6(2) of UTCCR 1999. Lord Bingham stated that the purpose of the directive is to protect customers and that purpose will be defeated if the exception were broadly interpreted.

While Lord Walker correctly noted that the directive reflected a compromise between the view points, it assumed that in the face of a conflict between the two, the freedom of contract view should triumph. However, since there is nothing in the directive or regulations that lend credence to this assumption, it is a path chosen at the discretion of the court. It is interesting to note that the Supreme Court criticized the Court of Appeal for going too far in interpreting the language of the law. As Chen-Wishart correctly noted the Supreme Court went to the other extreme by opting for the consumer choice view (Chen-Wishart, 2010, p. 161). It is noted that the Supreme Court relied on influential academic articles (The articles are Brandner and Ulmer, 1991 p 647 and Colins, 1994 p 229). But as Chen-Wishart correctly noted the same articles are opened to the alternative interpretation that will support a restrictive interpretation of the regulation.

There were two choices opened to the Supreme Court on this point. These are either to interpret the regulation's purpose as consumer protection in which case it will likely interpret the regulation to achieve that purpose or to interpret its purpose as transparency of consumer choice. The Supreme Court decided to take the later approach. As stated earlier, justification for this line of reasoning in the Supreme Court's opinion is that the Regulation prioritizes the freedom of contract as opposed to their reasonableness. Thus, the regulation is not so much about consumer protection but consumer choice.

However, if this is the case, the legislation is not substantially different from the traditional contract law which emphasizes autonomy to contract. This approach runs contrary to the EC Directive whose purpose was consumer protection. According to Article 8 of the Directive "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, *to ensure a maximum degree of protection for the consumer*". (emphasis added). The Supreme Court is well able to follow an approach that will achieve the objective of consumer protection but instead decided to infer a different purpose for the regulation implementing the directive in the UK.

"Unfair Surprise"

An affirmation that the Regulation is in accordance with s.8 of the Directive is about consumer protection would have opened up further possibilities. For example Davies has suggested that it was opened to the Supreme Court to recognise an implied principle which emanated from the judgments of the lower courts. This principle he called the principle of "unfair surprise". According to him,

"A pertinent principle, not expressly articulated by any of the judges but latent in the judgments of the lower courts, is that of "unfair surprise". If a reasonable consumer would be surprised by any term, then the assessment of the fairness of that term should not be excluded by regulation 6. A reasonable consumer may well be flabbergasted to be charged £40 for being overdrawn by £1 for only a day; the vast majority of customers do not consider insufficient fund charges to be an essential element of the contract they enter into with the bank. Sheltering such terms from a test

of fairness does little to further the goal of consumer protection”. (Davies, 2010, p. 21)

While it may be argued that this idea is radical, it is opined that the court could have taken such a route if it had interpreted the purpose of the regulation to be consumer protection and not consumer choice.

Price and Remuneration and the Composite Argument

The relevant legislation does not define “price & remuneration”. It was left to the court to determine the meaning of the phrase and what constitute price and remuneration. This is not a matter of Statute because what will constitute the price will differ depending on the context of a particular contract. Understanding that the exorbitant charges cannot be reasonably claimed to be for the service rendered or not rendered as the case may be, the Court had to decide what the charges in dispute are for. Accordingly, Lord Philips said: “... that a careful analysis of the transactions giving rise to the obligation to pay the Relevant Charges leads to the conclusion that they are not the prices paid in exchange for the transactions in question”(para 75 and 107).

However, the court came to a conclusion that certainly cannot be obvious to an average customer and even to the more than average customer. In their judgment, their Lordships were of the opinion that the charges are remuneration and price that is paid for a package of banking services; an event that is only triggered when a customer engages in unauthorised overdraft for whatever reason: inadvertent or deliberate. The conclusion of the Court was based on what can be conveniently called the “composite” argument. Lord Walker ably summarise the composite argument as follows: “Charges for unauthorised overdrafts are monetary consideration for the package of banking services supplied to personal account customers” (para 47). The Supreme Court was of the view that services offered by the banks to their current account customers are a composite package comprising: authorised or unauthorised overdrafts, usage of cheques, money transmission services, cash transactions and other administrative services. Payments for these services are also made in a composite manner including: interest forgone by customers in credit, overdraft charges for unauthorised or authorised overdrafts (including charges made for a bounced cheque or other payments made in the absence of fund) for those not in credit.

It must be noted that the Court of Appeal also accepted this line of reasoning. However, it was opened to the Supreme Court to accept this line of reasoning or Andrew J’s approach at the High Court. Andrew J concluded that the Relevant Charges were not charges for any service supplied. They were not payments for the individual service that triggered them. For example, turning down a request to honour a cheque on an overdrawn account cannot reasonably be described as a service. However, the court chose to construe the price and remuneration in such a way that appears to mean that bank customers were on a single composite contract by which they pay for services render to others. The price paid is thus not viewed in term of the service rendered to the individual but the “composite”. This line of reasoning will seem to suggest that customers pay for a wider scope of services beyond the services rendered to them. This will appear logically to mean that they unwittingly offer consideration for services rendered to others.

Three problems arise from this line of reasoning: The Court's approach is an ex post reconstruction of the contract between the parties. How would a consumer have understood this pricing structure and contractual mesh? The trial judge also noted this point (para 67). A further question is whether this arrangement is transparent enough to meet the objective of the regulation. The Supreme Court also attempted to justify the charges by pointing to the amount of revenue generated by the bank from the charging structure (For a contrary opinion see Morgan, 2010, p. 212). According to Lord Phillips

“Whatever may have been the position in the past, the Banks now rely on the Relevant Charges as an important part of the revenue that they generate from the current account services. If they did not receive the Relevant Charges they would not be able to profitably to provide current account services to their customers in credit without making a charge to augment the value of the use of their funds.”

Lord Walker also stated that:

“Charges for unauthorised overdrafts are money consideration for the package of banking services supplied to personal current account customers. They are an important part of the banks' charging structure, amounting to over 30 per cent of their revenue stream from all personal current account customers. The facts that the charges are contingent, and that the majority of customers do not incur them, are irrelevant.” (para 47)

However it does not appear reasonable to argue that the mere fact that bank generates a lot of money from the charges makes it right as suggested by the Supreme Court. According to Whittaker,

“...these arguments come very close to saying that the fact that the banks make a good deal of money out of the charges generated by the relevant terms means that they provide for part of the price or remuneration for the package of services. Moreover, rather than taking an objective approach to the determination of the price for the purposes of regulation 6(2)(b), they adopt the viewpoint of the supplier of the goods or services”. (Whittaker, 2011, p115)

Nothing compels the banks to generate profit this way. As the court noted, banks in other European countries such as France generate their income in a different way.

An alternative approach to the complex composite service and composite consideration construction is to simply interpret the customers' contract as one between an individual and the bank as argued earlier. Thus whatever consideration that is offered should be for the service rendered to the individual. This of course would have posed the dilemma of justifying the exorbitant charges under scrutiny. Here again discretion comes to play. The composite argument was one adopted at the discretion of the court to depart from the simple contract interpretation and to justify the charges.

The Discretion to Challenge Further: The European Court of Justice Option

Another point of the exercise of judicial discretion is in relation to the refusal possible appeal to the ECJ. This is despite the fact that as Lord Walker noted that “The Court of Justice has

not yet had occasion to rule on the scope of Article 4 (2)” (para 9). The Supreme Court summarily closed the door on the ground that the issue in this case is *acte clair*. (Davies notes, “[t]his is a dubious conclusion; after all four, experienced judges disagreed with the Supreme Court’s interpretation” (2010, p. 23). Even if that is not the case, the court was of the view that a correct interpretation of Article 4(2) is not essential to the case and the delay that will follow a reference should therefore be avoided. This is essentially a public interest argument.

The ECJ has the general disposition to interpret community law in a way that achieve community objective. There is the nagging question whether the interpretation given to the provision accord with community objective which should have been a matter for the ECJ. According to Woodroffe and Lowe,

“The English Courts must construe domestic law (the Regulations) in such a way as to give effect to the purpose of the Directive... Since one of the objects of the Directive is to approximate the laws of Member States the Courts may well give particular words... a European meaning; anyone putting forward an argument in this area should not do so in purely Anglo-Saxon terms”. (Woodroffe and Low, 2010, p. 163)

There is also the genuine possibility that by that decision, the UK consumer protection regime as interpreted may be not be in line with community law. As Lord Walker correctly pointed out, the fact that the two lower courts disagreed is a clear indication that the point may not be that *acte clair* and an approach to the ECJ may be more palatable to the general public that are bound to be affected by the decision. However, he refused reference on this ground and because he was of the opinion that the lower courts were clearly wrong. In respect of the public interest argument (para 50), it may be argued that the decision plays more in favour of corporate interest rather than public interest.

Lord Walker said that the correct construction of Article 4(2) of the Directive was not essential for the appeal (para 50). However, the judgement itself was based on the interpretation of what constitute “price and remuneration” in the equivalent of article 4(2) under domestic law. It was the Court’s understanding of the phrase that informs its adoption of the composite argument. It is thus submitted that a reference to the ECJ would have clarified the ambit of Reg 4 (2) which in turn affects the application of the Regulation to the facts by the court. The refusal to refer the Directive for interpretation in this case and in the earlier First National Bank’s case has been criticized (Dean 2002 p. 773; Morgan, 2010, p. 209; Whittaker, 2011, p. 106).

Conclusion

Judicial decisions shaped the foundation of modern banking law and practice. It has played important roles in shaping the relationship between the bank and the customer. It has been suggested in this article that the court’s decision in this case has less to do with statute interpretation and application and more to do with the use of discretion to choose between several competing options. The options, it is argued, are equally valid, plausible and can be supported in law. The implication is not only that the choice determines whether one party succeed or fail, it also has significant consequences for the relationship between bank and society.

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